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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

NO. 43 OCTOBER TERM, 1935

CLYDE MALLORY LINES

Appellant

vs.

STATE OF ALABAMA, ex rel. STATE DOCKS COMMISSION

Appellee

ON APPEAL FROM SUPREME COURT OF ALABAMA

BRIEF FOR APPELLEE

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State of Alabama, ex rel, State Docks Commission

Appellee.

No: 43
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BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

This appeal is taken for the purpose of testing the constitutionality of a harbor fee of $7.50 on vessels 500 tons and over at the Port of Mobile, levied by State Docks Commission, an arm of the State of Alabama, "for the purpose of meeting the expense attendant upon the supervision of the port and execution of the regulations and providing for the proper accommodation of vessels at this Port".

It is not questioned by appellant that the fees sued for were used for the protection of shipping in Mobile Harbor, including appellant's ships, that they had the benefit of the services rendered by the Commission, nor that the charges were reasonable for the service named in the order of the commission.

Attention is called to the fact that appellant seeks to establish the purpose of the harbor fee by the opinion of a mere subordinate, (the harbor master), rath-

er than by the resolution establishing it and the statutes and harbor rules applicable thereto.

Appellee does controvert the statement of defendant's witness that "there was no service whatsoever rendered defendant's vessel, or any one of them, for which these charges are being made, and attention is called to the witness' clarification of his testimony by saying no service was rendered on them." (R. 51).

PECULIAR LOCAL CONDITIONS

The Harbor of Mobile is but a narrow ribbon known as Mobile River (approached by a narrow dredged channel) the heart of which is the restricted area between Cochrane Bridge and the Bay. Here vessels of every character pass and repass, anchor, load and unload; are menaced by the movements of each other while affected by wind and tide, by improper anchorage and loading and unloading, by fire from the unloading of oil, gasoline and other combustibles, by the discharge of such combustibles into the harbor; and by obstructions such as rafts and flat boats placed within the narrow bounds of the harbor.

The Harbor Master testified, (Record 39-50,) that:

The principal anchorage for vessels is from Dauphin Street in Mobile River up about four miles to Old Government Oil Dock;

That it is a narrow river, this inner harbor, averaging in width from bank to bank, from 700 feet to 1,000 feet, the navigable channel being only 500 feet up to State Docks and only 300 feet above;

That there are industries or other improvements on both sides, some having slips for vessels to enter, such as dry docks and ship building plants (6), Turner Terminals, State Docks, public docks, refining companies, coal tipples and many other industries used by vessels coming in port;

That all Clyde-Mallory vessels coming in this port exceed 500 tons capacity;

That vessels coming into port vary from 150 feet to 550 feet in length, and such vessels coming out of slips from either side must have a clear way into the dredged channel;

That there is danger of collision between vessels moving up or down the channel with those coming from slips or swinging from alongside wharfs; that vessels should be anchored in the proper place with room to swing, and a high tide with the wind might swing the ship across the river, and unless there was some method or rule to make those ships anchor and run a line ashore they would swing around with the tide and close the channel ,and that supervision of anchorage of vessels is in him;

That supervision over the port is necessary to avoid collisions of that kind and to see that vessels coming into port do not endanger other shipping by discharging oil or gas on the waters of the harbor, to avoid dangers to shipping in port from obstructions such as logs, rafts, barges or anything of that kind and from improper anchorage of a vessel;

That constant supervision over the port in all of these ways is necessary for the safety and protection

of all vessels in port, and that he has never known of any agency for the protection of shipping from these sources other than the harbor master and his predecessor the chief wharfinger, and that it devolved upon him to do these things and he does them by virtue of the rules and regulations formulated and put in force by the State Docks Commission; and that he has been called upon at various times to exercise that supervisory duty, including appellant;

That hazards of a port increase in proportion to growth of traffic, that there are now more ships, and that the larger the ships naturally the more danger there is and the greater the danger to other shipping;

Exhibit F to Captain Smith's testimony, (Record 44), is a letter from the Mobile agent of the Clyde-Mallory Lines to said Harbormatser, stating that said agent had been approached by several of their captains as to the lack of clearance for vessels to pass the Dredge San Diego and her pipe line now operating on the lower river "with hopes that you will be able to have it rectified in order to avoid any accident"; and Exhibit G (Record 45) is a letter from the Master of one of the Clyde-Mallory vessels, calling attention to the same encroachment, "the ship passing having to hug the dock too closely and making it hard to avoid hitting same with the stern when getting back into the river again. Coming up it is bad; must be worse swinging on starboard wheel, bound out."

The Witness C. E. Sauls testified: (Record 50) that he is assistant General Manager at the State Docks, and before occupying that position was engineer for five or six years with supervision of the Port, the har-

bormaster and assistants, and that for the safety of shipping in the Port of Mobile he considered it very essential that the use of the harbor for shipping be regulated.

STATUTORY PROVISIONS

For the protection and benefit of shipping in port the Legislature made it the duty of the State Harbor Commission (now State Docks Commission) to perform certain services specified in the legislative acts or in regulations by them authorized. These services are important and valuable to every vessel that enters the port, and are not required as mere subterfuges upon which to base a charge against vessels.

These provisions are contained in Chapter 44 of the Code of Alabama of 1923, Sections 2427 et seq. and in the Rules and Regulations for the Port of Mobile.

Section 2433 of the Code provides for the appointment of the Chief Wharfinger, Deputy Wharfinger, and other employees.

Section 2434 gives jurisdiction to the Port over the waters and shores of Mobile Bay, Mobile River and tributary streams in which the tide ebbs and flows.

Section 2438 provides that

"The Board may make all reasonable rules and regulations as to where vessels shall be moored and where vessels shall be placed, and for the shifting and mooring of vessels."

Section 2455 makes it the duty of the Chief Wharfinger to

"regulate the positions of vessels in the docks and harbor, and cause them to be removed from time to time, and from place to place, as the general convenience, safety and good order may require. . . . He may require vessels to accommodate other vessels as the circumstances warrant."

Section 2459 provides that

"The Chief Wharfinger must require all wharf owners, dock companies, ship masters, consignees, pilots and masters of tow boats to conform to the regulations of the Board. He must require the harbor, docks, slips, wharves, piers, and other premises under the jurisdiction of said Board to be kept free of all obstructions, and when parties fail to obey his orders to remove the same, he must forthwith report the fact to the Board, and execute their orders in relation thereto."

Section 2478 provides that

"The Board shall regulate the handling of the rafts and the character of rafts within the limits of its jurisdiction and may also regulate the anchorage, berthage, and moorage of steamboats, or other water craft."

Section 2490 provides that

"The Chief Wharfinger shall execute and enforce the rules and regulations which may be established by said Board of State Harbor Commissioners pursuant to the provisions of this Article."

Section 2 of the Act of 1923 creating State Docks Commission (Acts 1923 page 330) vests the said Commission with all the foregoing powers duties and authority in language following:

"There is hereby created a board or body in lieu of the present State Harbor Commission, which Commission is hereby abolished, the new board to be known as the State Docks Commission . . . which Commission, in addition to the duties herein more particularly specified, shall be vested with and shall exercise the powers, duties and authority **now** vested in and exercised by the present State Harbor Commission which are not in conflict herewith."

Section 1 of the State Docks Act approved January 17, 1927 provides that the authority and powers conferred upon the Commission by the Act of 1923, among other, of "operating all harbors and seaports within the State . . . are hereby continued."

Section 3 of the Same Act, extends the jurisdiction of the Commission over Mobile Harbor and all streams flowing into such harbor in which the tide ebbs and flows.

Section 9 of the same act provided that:

"The operation of all harbors and seaports within the State and the improvements and facilities hereby authorized shall be conducted in the name of the State Docks Commission . . . The Commission may adopt rules not inconsistent with the provisions of this Act for the purpose of regulating, controlling and conducting the said operation."

Section 18 of the same Act provides that:

"The said Commission is hereby authorized to formulate and promulgate rules and regulations for the operation of any seaport or harbor within the State."

HARBOR RULES

Port and Harbor Rules adopted pursuant to the above statutory provisions, a copy of which is attached to the complaint, 17 in number, not counting pilotage rules not pertinent to the issues, impose upon the Chief Wharfinger (and Deputy Wharfinger) the performance of many varied services in behalf, and for the protection, of shipping within the Harbor, which may be summarized as follows: (Record 3-8, 23-28, 32-38)

Rule 1. Requires vessels on arrival to take in gib-booms and out-riggers and take anchors on when not in use;

Rule 3. Charges the Chief Wharfinger with the duty of selecting and changing anchorages, with movements of vessels into and out of slips and berths, and with all other ship movements that affect a fair joint use of the facilities of the Port;

Rule 4. Requires vessels arriving to receive or discharge cargo and moor on a line parallel with the channel of the River; and all vessels to be on the same line and all vessels to be moored at both ends with anchors sufficient to hold them in line, under the Wharfinger's directions;

Rule 5. Requires him to see that all lighters, barges, timber, rafts, or similar floating objects placed alongside vessels, etc., must be so placed as to not unnecessarily obstruct navigable water and must be made fast securely at both ends to prevent swinging and to have suitable lights at night;

Rule 6. Requires him to see that no vessel in the channel shall be allowed to make fast a line ashore except in emergency;

Rule 7. Requires him to see that no vessel is allowed to receive or discharge cargo while anchored in the River below Cochrane Bridge without permission;

Rule 9. Requires him to see that channel is kept clear to permit vessels to leave the Harbor;

Rule 10. Requires him to see that no vessel exceeds a safety speed limit in Mobile River;

Rule 11. Requires him to give vessels maximum draft to which they can be safely loaded;

Rule 12. Requires him to see that vessels in slips at Dry Docks do not project beyond the Harbor Line.

Rule 13. Requires him to see that vessels must not be berthed more than two abreast at margin of wharves, etc.;

Rule 14. Requires him to see that a vessel lying alongside a marginal wharf must heave anchors up to hawse pipes;

Rule 15. Forbids the shifting of any vessel or change of its anchorage without assistance of a Deputy Wharfinger and outlines the duties of the Chief Wharinger in relation thereto;

Rule 17. Makes it his duty to see that no steamship, oil tanker, barge or other vessel within the waters of the harbor shall cast or discharge into the waters of the Harbor any oil or oily mixtures; that no such vessel carrying fuel oil shall pump bilges containing oil mixtures into the waters of the Harbor; and further requires him or his deputy to seal the discharge and bilge valves of vessels.

It is manifest that the State of Alabama and its Executive Arm, the State Docks Commission, by enacting the foregoing stringent protective statutes and rules, recognized the existence of many local hazards peculiar to shipping in the Port of Mobile, and sought

thereby to make the Port safe and attractive to vessels in the coastwise and foreign trade. And the language of this Honorable Court, as applied to similar though far less stringent requirements of another port, are peculiarly applicable to those of the Port of Mobile:

"The duties thus imposed upon the harbormaster, if faithfully discharged, must, it must be conceded, materially advance and not obstruct or burden the trade and business on the Mississippi River, especially at the Port of St. Louis. Services rendered by him in the execution of those duties **would be in aid,** and not a hindrance, **to commerce and navigation."**

N. W. Packet Co. v. St. Louis 100 U.S. 423, 427; 25 L. Ed. 689

Having imposed these onerous duties and services upon State Docks Commission, through its harbormaster and other agents, the Legislature provided in part as is contained in Section 2443 of the Code of Alabama, and being a part of Chapter 44, as follows:

"The Board may make and collect suitable charges for the performance of any services rendered under the authority given in this chapter."

All of the foregoing statutory provisions and Harbor Rules provide primarily for services to be rendered vessels collectively and individually well within the power of the State to provide for the police regulation of the port. They provide for police regulation peculiar to the local conditions of this port. They are not of such character as could be provided under national supervision for all ports.

Some of the services required of the wharfinger, now harbor-master, and his assistants are of such

character as that a charge for these specific services can be made, such as the shifting of a vessel; but most of them are vital to the safety of each and every vessel in port, the only suitable charge for which is the charge against a vessel designated as a harbor fee. It is in no sense a tonnage tax, but is a charge in aid of the Police Powers of the State to protect shipping.

These services enure to each vessel entering the harbor as fully as those requiring the harbormaster to walk the deck of such vessel.

Vessels having their situs in the Port are required to carry their part of the burden by payment of customary licenses and taxes.

The purpose for which the harbor fee (and other port charges) was laid, is clearly expressed by the Minutes of the Meeting of the Commission held February 25th, 1924, as follows:

"General Sibert presented to the Commission for consideration a schedule of charges to be collected by the State Docks Commission for Harbor Fees for the purpose of meeting the expense attendant upon the supervision of the Port and execution of the regulations and providing for the proper accommodation of vessels at this Port, ... effective March 1st, 1924, as follows:"

The resolution and schedule of fees are shown on pages 23-24 of the record; the fee involved in this case being the item of $7.50 on vessels of 500 tons and over.

CONSTRUCTION OF STATE STATUTE

The Supreme Court of Alabama, in a well considered opinion in this case, has definitely sustained

the authority of the Docks Commission, under State Statutes, to impose this charge of $7.50, and the only question before this Honorable Court is whether or not it is in violation of the Constitution of the United States. In an able and illuminating opinion by Justice Bouldin, the Alabama Court holds that it is not; and after reviewing the powers and duties of the Commission, says:

"The authority and duty of the state to make proper harbor regulations suited to local conditions and to actively supervise or operate the harbor in accordance with such regulations, in the absence of action by Congress, are now fully settled; that this must entail expense is obvious; that such service is not a hindrance to, but in aid of, shipping, is clear.

"The question, then, resolves itself into the simple inquiry; Does the Constitution of the United States contemplate that such service shall be rendered at the expense of the taxpayers or covered by some special fee not applicable to all ships which share the benefits of the service? We think not.

"It is not questioned that the fees sued for were for the use of the harbor by appellant's ships in the conduct of the shipping business; that they had the benefit of the services outlined above; that the charges were reasonable for the service named in the order of the Commission."

Clyde Mallory Lines vs State ex rel State Docks Commission - 229 Ala. 624, 159 Sou. 53.

For convenient reference, the entire opinion of Alabama Court in the foregoing case, is printed as an appendix to this brief.

The construction given to a statute of a state by the Supreme Court of such state is binding on the

Supreme Court of the United States;

Cleveland Trust Co. v. Lander 184 U.S. 111, 46 L. Ed. 456.

Louisville & Nashville R.R. Co. v. Kentucky 183 U.S. 503-7; 46 L. Ed. 298-302.

Des Moines Nat. Bank v. Fairweather, 263 U.S. 103 68 L. Ed. 191.

TONNAGE TAX OR POLICE REGULATION

Early and leading cases on these diverse subjects are the "State Tonnage Tax Cases" arising in the port of Mobile and are entitled Jessie J. Cox et al. vs. Elisha B. Lott, 12 Wallace 204, and the Mobile Trade Company vs. Elisha B. Lott, 12 Wallace 221.

The State of Alabama had passed a **revenue act** among other things levying a tax on vessels, "at the rate of $1.00 per ton of the registered tonnage thereof." This Act was attacked as being in violation of Paragraph 3, Section 10, Art. I of the U. S. Constitution and the Court properly so held.

But in doing so the Court upheld the right of states to enact inspection laws under its Police Powers, using the following language:

"Taxes in aid of the inspection laws of a State, under special circumstances, have been upheld as necessary to promote the interests of commerce and the security of navigation. Cooley vs. Port Wardens, 12 How., 314.

"Laws of that character are upheld as contemplating benefits and advantages to commerce and navigation, and as altogether distinct from imposts and duties on imports and exports and duties of tonnage. Usage, it is said, has sanctioned such laws where Congress

has not legislated, but it is clear that such laws bear no relation to the Act in question, as the Act under consideration is emphatically an Act to raise revenue to replenish the treasury of the State and for no other purpose, **and does not contemplate any beneficial service for the steamboats or other vessels subjected to taxation.**" Emphasis supplied.

Cox vs. Lott, 12 Wallace 221, 20 L. Ed. 375.

The distinction between the police power and the taxing power is clearly brought out in Corpus Juris, in discussing "Constitutional Law," as follows:

"The police power must be distinguished from the taxing power, and the distinction is this: The taxing power is exercised for the purpose of raising revenue and is subject to certain limitations elsewhere considered, while the police power is exercised only for the purpose of promoting the public welfare, and, although this end may be attained by taxing or licensing occupations, yet the object must always be regulation and not the raising of revenue, and hence the restrictions on the taxing power do not apply."

12 Corpus Juris, 906, Section 414.

The case of Cooley vs. Port Wardens referred to by the Court in the Cox vs. Lott case, is a leading case on the question of the power of the States to enforce police regulations appropriate to local conditions which will affect commerce.

In that case the State of Pennsylvania had passed an Act making it compulsory on all vessels of 75 tons burden to receive a pilot and with provision that if a pilot be not taken the vessel should be liable for a sum equal to one-half the politage fee.

The Act was contested on the ground that is was re-

pugnant to the second and third sections of said Section 10, Art. I of the Constitution.

Justice Curtis delivered the opinion of the Court stating among other things on page 1002, 13 L. Ed. as follows:

"We think this particular regulation concerning half pilotage fees is an appropriate part of a genaral system of regulations of this subject. Testing it by the practice of commercial states and countries legislating on the subject, we find it has usually been deemed necessary to make similar provisions."

And on page 1006 as follows:

"We are of opinion that this state law was enacted by virtue of a power, residing in the State to legislate; that it is not in conflict with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the Supreme Court of Pennsylvania in each case must be affirmed."

Cooley vs. Port Wardens, 12 How. 299, 13 L. Ed. 996, 1005; h.n. 3

In the case of Gibbons vs. Ogden, Chief Justice Marshall in an able and comprehensive opinion, upholds the right of the Federal Government to regulate commerce under paragraph 3 of Section 8, Art. I of the Constitution, providing that

"Congress shall have the power—3, To regulate commerce with foregin nations, and among the several states ,and with the Indian tribes;"

but in so doing, expressly recognized the police power of States to enact inspection laws; and in discussing the restrictions upon the power of the States said:

(P. 71) "That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. . . . They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to general government; all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc. are component parts of this mass."

Gibbons vs. Ogden, 9 Wheaton 1; 6 L. Ed. 1, 71-72

In Morgan Co. vs. Louisiana, the Louisiana laws imposing quarantine fees were being contested, upon the grounds, first, that "they are null and void because they impose tonnage duties," second, they "impose on vessels the cost of a system created for the benefit of a whole community; and third, "unless the sum imposed on the vessel is for a **direct service to the vessel** proportioned to the amount claimed it is repbrobated tonnage duty." And these are the same grounds being raised in opposition to the harbor fees now in question.

The law was upheld. And in doing so Justice Miller further said:

"2. But, aside from this, quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress.

"The matter is one in which the rules that should govern it may in many respects be different in differ-

ent localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the Harbor of New York. In this respect the case falls within the principles which governed the case of Wilson vs Blackbird Creek Marsh Co. 2 Pet. 245 (27 U. S. Bk. 7 L. Ed. 412); Cooley vs Board of Wardens, 12 How. 299 (53 U. S. Bk. 13, L. Ed. 996); Gilman vs Phila. 3 Wall. 727 (70 U. S. Bk. 18, L. Ed. 96); Pound vs Turck, 95 U. S. 462 (Bk. 24 L. Ed. 525); Hall vs DeCuir, 95 U. S. 488 (Bk. 24, L. Ed. 548); Packet Co. vs Catlettsburgh, 105 U. S. 562 (Bk. 26 L. Ed. 1170); Transportation Co. vs Parkersburg, 107 U. S. 702, (Bk. 27 L. Ed. 588); Escanaba Co. vs Chicago, 107 U. S. 678 (Bk. 27 L. Ed. 442):"

Morgan Co. vs Louisiana, 118 U. S. 455, 30 L. Ed. 237, 242.

In the case of Cincinnati Co. vs. Board of Trustees there was involved the question of penalties imposed for refusal to obey the rules for places of landing, and the orders of the wharfmaster on that subject, as being taxes on tonnage. The opinion of Justice Miller is aptly stated in the fourth head note of the case as follows:

"4. Appropriate regulations prescribing places for the landing of vessels and placing the matter under the control of a wharfmaster or other officer, whose duty it is to look after it, are valid and constitutional, and the States may prescribe them until Congress assumes to do so."

(P. 1171) "Such rules and regulations and such an officer exist in every place where the number of the inhabitants or the amount of the water-borne commerce justifies or requires it. The necessity for the

existence of this power cannot be doubted. We are not aware that in any instance Congress has attempted to exercise it. If it be a regulation of commerce under the power conferred on Congress by the Constitution, that body has signally failed to provide any such regulation. It belongs, also, manifestly, to that class of rules which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing places, can be properly made. If a regulation of commerce at all, it comes within that class in which the States may prescribe rules until Congress assumes to do so. Cooley vs Board of Wardens, 12 How., 299; Gilman vs Philadelphia, 3 Wall., 727 (70 U. S. XVIII., 100); Crandall vs Nevada 6 Wall., 42 (73 U. S. XVIII., 746); Pound vs Turck 95 U. S. 462 (XXIV., 526)."

Cincinnati Co. vs Board of Trustees, 105 U. S. 559, 26 L. Ed. 1169.

In the foregoing case the wharfage charge was sought to be equitably apportioned by charging $1.00 per vessel over 100 tons and 50 cents per vessel under 100 tons; and it was contended this constituted a specific tax on tonnage. But this Honorable Court then held that:

"It is no objection to the ordinance fixing the amount of this compensation that it was measured by the size of the vessel, and that this size was ascertained by the tonnage of each vessel. It is idle after the decisions we have made to call this a tax on tonnage."

This ruling is directly applicable to the case now before the Court.

TAX—TAXATION

The terminology of the resolution fixing the harbor

fee places the charge neither "upon", nor "against" vessels of dimensions indicated, nor does it undertake to declare a lien the usual incident of a tax, upon vessels. The statutes under which the Docks Commission acted do not declare a lien for such charges and make no provision for enforcement against the vessel. It is in no sense a tax, and is collectible like any other charge against owner and charterer.

The resolution merely fixes "a schedule of charges to be collected by the State Docks Commission for Harbor Fees for the purpose of meeting the expense attendant upon the supervision of the Port and execution of the regulations and providing for the proper accomodation of vessels at this port." In the light of conditions prevailing in this port the charge is both reasonable and necessary; and the evidence shows that the same charge prevails in other ports.

Appellant, by iteration and reiteration, would drug the mind of the Court into accepting as true its claim that the charge in question is a tax for revenue and a tax on tonnage.

A service charge, as in the instant case, is not made a tax within the meaning of the Constitution because it may or does affect commerce. The books abound with decisions to the contrary, among others, the case of Morgan Co. vs. Louisiana 118 U. S. 455 (30 L. Ed. 227). Legislatures, Courts and even the common mind, have a fairly accurate idea of what constitutes a tax, and the difference between a tax and a charge for performance of services required by law.

The term taxes as used in the federal constitution

must be confined to the idea which they commonly and ordinarily present to the mind as exactions to fill the public coffers for the payment of debts and promotion of the general welfare of a country.

Worsley vs. New Orleans, 41 Amer. Dec. 333,

Taxes are defined to be burdens or charges imposed by the Legislative power upon persons or property to raise money **for public purposes.**

8 Words and Phrases "Tax-Taxation" p. 6867 and numerous citations.

Taxes are defined as being the enforced proportional contribution of persons and property, levied by authority of the State for the support of the government and for all public needs.

Ibid, page 6868 and numerous citations on that page.

This honorable Court has defined a tax as follows:

"A tax, says Webster's Dictionary, is a rate or sum of money assessed on the person or property of a citizen by government for the use of a nation or state. 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes; Cooley Const. Lim. 479. Coulter J. in Northern Liberties vs. St. John's Church, 13 Pa. St. 104, says, very forcibly, I think, the common mind has every where taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose.

Savings Assn. vs Topeka 22 L. Ed. 455, 461, 20 Wall 655.

In Morgan Co. vs. Louisiana the steamhisp company contended that quarantine fees constituted a tonnage tax, a regulation of commerce, etc. The Court had this to say:

"In all cases of this kind it has been repeatedly held that when the question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of federal authority this Court will look into the operation and effect of the statute to discern its purpose. . . . In the present case we are of opinion that the fee complained of is not a tonnage tax; that, in fact it is not a tax within the true meaning of that word as used in the Constitution, but is a compensation for a service rendered." 118 U. S. 455, (30 L. Ed. 237-241.)

We submit that the appellant's contention that the charge in question is a tax for revenue is not sustained either by the resolution imposing it or by its practical operation. As we see it, the sole purpose of its imposition is that expressed in the resolution imposing it, and that without such imposition, shipping entering this port would do so at its peril.

In the instant case there is not the slightest suggestion that the Harbor fees in question yielded anything in excess of the cost of the services rendered, or that its purpose was to raise revenue.

The fact that the fees in question do not yield more than sufficient to cover the cost of the services rendered, considered in connection with the expressed purpose of the Commission's resolution in fixing the charges, demonstrates that the State through its said agency was not exercising its taxing power, which it

could not delegate, but was acting solely in the exercise of its police power.

In the case of State v. Schofield, the Supreme Court of Louisiana had before it the kindred question of whether or not a license fee to do business had been imposed for regulation or revenue; and it quotes with approval from Judge Cooley's Work on Taxation, page 589, in part as follows:

"A fee for the license may still be exacted, but it must be such a fee only as will legitimately assist in the regulation, and it should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers .... Moreover, in fixing upon the fee, it is proper and reasonable to take into account, not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed."

Continuing, the Louisiana Court said:

"Accepting the foregoing statements of what the law is on this point as being authoritative, we have to consider whether the license we are dealing with in this case is (in the words of Judge Dillon) 'plainly imposed for the sole or main purpose of revenue,' or, in other words, whether it goes beyond providing for the expense of the direct regulation of the business in question, together with that of (to use the expression of Judge Cooley) 'all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed.' "

State vs Schofield - 136 La. 702

Having thus pointed out the distinction between the taxing and the police power of the State, the Louisiana Court, in the above cited case, found that the fee

in question was levied under an act that not only purported to be but was an exercise of the taxing power of the State. While in the case now before this Honorable Court the resolution of State Docks Commission of Alabama expressly recites the levy to be for "the purpose of meeting the expense attendant upon the supervision of the Port and the execution of the regulations and providing for the proper accommodation of vessels at this Port". And, as stated by Judge Cooley, in fixing the harbor fee in question, it was "proper and reasonable to take into account, not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost" in connection with that supervision and regulation.

In the light of these principles and applicable statutory provisions, the Supreme Court of Alabama in this case found that:

"The evidence well supports a finding that the harbor fee in question is not a tax imposed for the privilege of entering the port, a tax on the privilege of navigation upon the navigable waters, but a charge to cover the expenses of the State agency in supervising and operating the port so that ships may enter and depart from the port in safety and without unnecessary delay; an expense of facilitating navigation, promoting commerce. It is not claimed that the schedule of fees, nor the particular fee in question, is excessive, if permissable for the purposes mentioned."

CONCLUSION

We respectfully submit that the judgment of the Supreme Court of Alabama should be affirmed.

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APPENDIX

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1934-35.

1 Div. 822.

Clyde-Mallory Lines

v.

State of Alabama, ex rel

State Docks Commission,

Appeal from Mobile Circuit Court

BOULDIN, J.

The State of Alabama, on the relation of the State Docks Commission, brought suit against Clyde Mallory Lines to recover a sum alleged to be due for "Harbor Fees" prescribed by order of said commission.

By such order the commission fixed a schedule of "Harbor Fees for the purpose of meeting the expense attendant upon the supervision of the Port and execution of the regulations and providing for the proper accomodation of vessels at this Port."

This schedule included the following:

"Vessels under 500 tons - making weekly trips, $2.50
Vessels under 500 tons, 5.00
Vessels 500 tons and over, 7.50"

Clyde Mallory lines operates ships in the coast-wise

trade between New York and Mobile, all over 500 tons, registered tonnage.

The demand sued for covers items accruing wholly under the schedule of "Vessels, 500 tons and over, $7.50."

Special fees are scheduled for "shifting" and "mooring" of vessels.

This harbor fee of $7.50, under the evidence, as well as the tenor of the above order, is a charge against each vessel of that class entering the harbor in the conduct of its shipping business.

This charge is challenged as in violation of two provisions of the Constitution of the United States. First, that it lays a "duty of tonnage" forbidden to any State, without the consent of Congress. Art. 1, Sec. 10, Clause 3. Second, that it imposes an unlawful burden on interstate commerce, and violative of Art. 1, Sec. 8, Clause 3.

The State Docks Commission is a State agency created in 1923. - —Acts 1923, page 330. Among its duties and powers is the contruction and operation of State docks, terminals, and other facilities, in aid of commerce and shipping through the Port of Mobile, a State project authorized by constitutional amendment. This function is not here involved.

The State Docks Commission was also created in lieu of a State Harbor Commission, and vested with the powers and duties theretofore pertaining to the State Harbor Commission under Chapter 44 of the Code of 1923, Section 2727, et seq.; Acts of 1923, page 330, Section 2.

By an Act of January 17th, 1927 (Acts 1927, page 1), the functions and powers of the State Docks Commission were further defined.

The jurisdiction of the commission extends over the waters and shores of Mobile River and its tributaries to the head of tidewater, and to the outer bar of Mobile Bay.—Code, 2434; Acts 1927, page 1, Section 3.

The State Docks Commission is charged with the "operation" of the harbor and seaport, and empowered to "adopt rules not inconsistent with the provisions of this Act for the purpose of regulating, controlling and conducting the said operation." - Acts 1927, pages 8, 13 and 14, 9 and 18.

The commission is authorized to "fix from time to time reasonable rates of charges for all services and for all improvements and facilities provided under the authority of this Act." - Acts 1927, page 12, §14. See also, Code §2443.

The State Docks Commission did adopt and promulgate in 1924, and re-adopt in 1927, rules and regulations, 17 in number, deemed by the commission best adapted to conditions in that harbor.

The inner harbor is defined as beginning at Beacon 40 located in the bay, some two miles out from the mouth of Mobile River, and extends up the river and tributaries to the head of tidewater, a distance of some four miles above the mouth of Mobile River.

The busy shipping zone is in the lower stretches of

the river, which is 800 to 1000 feet in width. The dredged channel for navigation is 500 feet in width up to the State Docks, and then narrows to 300 feet.

A synopsis of the rules and regulations above-mentioned will appear in the report of the case.

Suffice to say here, they look to the safety of vessels, and the dispatch of shipping business in the port. For such purpose an active and continuous harbor-master service is provided through a Chief Wharfinger and his deputies.

The supervision thus provided and shown by evidence to be necessary covers services properly referable to "mooring" and "shifting" of vessels for which a special fee is fixed.

But supervision extends to keeping the channel clear, not only by the placement of ships and their proper anchorage, but by controlling rafts, etc.; and protection against fire from the discharge of oils on the waters.

These services may be said to inure to each vessel which enters the harbor and comes within the zone where such supervision affords protection.

Other regulations and the active supervision required to assure their observance constitute a more direct service to each ship.

Each ship is required to notify the harbor master of its arrival; the pilot is required to furnish the ship-master with a copy of the harbor rules and regulations, and on entering the harbor there is a continuing duty on the State agents to see that the speed

rules are observed, and that all ships and craft accommodate their movements so as to effect a fair joint use of the facilities of the port.

The evidence well supports a finding that the harbor fee in question is not a tax imposed for the privilege of entering the port, a tax on the privilege of navigation upon the navigable waters, but a charge to cover the expenses of the State agency in supervising and operating the port so that ships may enter and depart from the port in safety and without unnecessary delay; and expense of facilitating navigation, promoting commerce. It is not claimed that the schedule of fees, nor the particular fee in question, is excessive, if permissible for the purpose mentioned.

It may be truly said the general supervision or policing of the harbor to maintain conditions of safety therein in all kinds of weather is for the benefit of the shipping public. But this is true because of service to each ship, as a part of the shipping public. We can discern no difference in principle between a service rendered to the ship on its arrival, and that rendered in advance to make the harbor safe to enter on it arrival. The outlay for such service goes to the protection of the ship while in the harbor, and to facilitate its movements therein. The outlay is not for making of rules and regulations, but for the expenses of a personnel and an equipment of harbor craft to actively "operate" the harbor, to use the wording of the statute, under and in accordance with such necessary regulations. We cannot question that each and every ship shares in this service.

In measuring the benefits so conferred, the classi-

fication of ships according to size, "500 tons and over," at one rate, and under "500 tons" at a lower rate, would seem to be unobjectionable, but rather in keeping with the general purpose to make the charges proportionate to the benefits received.

In this connection, special fees for "mooring" and "shifting," chargeable to ships who receive such service, would not seem to bar a separate charge for servces common to all ships. To make special fees yield an income to meet the expense for the services here shown, would we think, unfairly burden vessels receiving these special services, while others sharing in the benefits of such outlays would be relieved. So, a schedule, fixing several charges, each ship subject to one or more as the case may be, but in the aggregate not in excess of the reasonable expense of the service to such ship, seems clearly just.

Does the Constitution of the United States forbid such charges or fees?

The decisions of the Supreme Court of the United States are and must be controlling on the question.

In numerous decisions "duty of tonnage" has been considered and defined. We have considered these cases with care in the light of the facts presented therein.

In many cases the general proposition is stated that all levies by the State, or its authority, for the privilege of entering a harbor, the exercise of the free right of navigation upon navigable waters, are forbidden, being within the evils aimed at by the Consti-

tution. This is true whether such tax is imposed strictly on a basis of tonnage or otherwise.

Navigation is a part of commerce, and a tax burden imposed on the one is a burden on the other.

Duty of tonnage is forbidden likewise as to vessels navigating the waters of a State, even ships engaged in intra- state commerce. - **Steamship Company v. Portwardens,** 6 Wallace 31; **State Tonnage Tax Cases,** 12 Wallace 204; **Peete v. Horgan,** 19 Wallace 581; **Cannon v. New Orleans,** 20 Wallace 577; **Inman Steamship Co. v. Tinker,** 94 U. S. 238; **Transportation Company v. Parkersburg,** 107 U. S. 691; **Gibbons v Ogden,** 9 Wheaton 1, 201-3.

On the other hand, fees or charges imposed under State laws for wharfage, pilot service, and quarantine purposes, as compensation for the service, when rendered by private agencies, or to cover the expense of providing such service by state or minicipal authority, are not duties on tonnage. - **Cooley v. Board of Wardens, etc.,** 12 Howard 288, 312, 314; **Packet Company v. Keokuk,** 95 U. S. 80; **Vicksburg v. Tobin,** 100 U.S. 430; **Packet Company v. St. Louis,** 100 U. S. 423; **Transportation Company v. Parkersburg, supra; Packet Company v. Catlettsburg,** 105 U. S. 559; **Morgan's Steamship Company v. Louisiana Board of Health, et al,** 118 U. S. 455; **Huse v. Glover,** 199 U. . 543.

In several of these cases the court discusses the principles underlying the distinction between tonnage taxes and fees and charges for services or facilities in aid of navigation and commerce.

In **Cooley v. Board of Wardens, etc., supra,** speaking

of these provisions of the Federal Constitution, it was said:

"This provision of the Constitution was intended to operate upon subjects actually existing and well understood when the Constitution was formed. Imposts and duties on imports, exports, and tonnage were then known to the commerce of a civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial States enforced their pilot-laws, as they were from charges for wharfage or towage, or any other local port-charges for services rendered to vessels or cargoes; and to declare that such pilot-fees or penalties, are embraced within the words imposts or duties on imports, exports, or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language." - 12 Howard, 299 (314).

In that case pilot fees, imposed whether a pilot was used or not, were sustained on the ground of the propriety of maintaining a pilot-service for protection against dangers of navigation in the absence of such service. The income from fees, where no pilot was used, went to a pilots' widows' and orphans' fund.

This ruling has been often re-affirmed.

Speaking of harbor regulations in **Inman Steamship Company v. Tinker, supra,** it was said:

"Similar provisions, varying according to local circumstances, exist at all important points throughout the world wither marine commerce finds its way. They are indispensable to those engaged in that business. They fence out many evils, and promote largely the convenience and the welfare of those engaged in this field of enterprise. Perhaps it is hardly too strong language to say, they are well nigh vital to

commerce itself. It may be conceded, also, that foreign steamships and other vessels visiting the ports of a State for business purposes may be made liable by the laws of such State for all reasonable and proper port charges. This is but a fair return for the benefits received." - 94 U. S. 238 (244).

In that case the charge was imposed strictly on the basis of the registered tonnage of the vessel. From a reading of the facts, in connection with the opinion, it appears the court deemed the levy oppresive, and without relation to the service rendered. It was held void because a tonnage tax, citing earlier cases. The opinion proceeds:

"The tax imposed is not merely a mode of measuring the compensation to be paid. The answer to this suggestion is, that it is exacted where there is nothing to be paid for, and has no reference to any circumstance in this connection but the tonnage of the vessel and the class to which it belongs." - 94 U. S. 245.

Reviewing these cases in **Morgan's Steamship Company v. Louisiana Board of Health, et al, supra,** it was said:

"But in all these cases the contribution exacted was measured by the tonnage of the vessel in express terms; and the decision of the court rested on that fact."—118 U. S. 462-463.

In **Packet Company v. Catlettsburg, supra,** regulalations imposing wharfage fees at a municipal wharf, and requiring vessels to land at that wharf were sustained as proper and necessary in the particular case for the safety and convenience of ships and other pertinent interests.

In **Huse v. Glover, supra,** the State of Illinois in-

stalled and operated locks in the Illinois River, charging tolls for the use of the locks, to cover such outlays. These tolls were upheld against an insistence that they were tonnage taxes. Speaking of the ordinance of 1787, providing that the navigable waters in such territory should be free and "without any tax, impost, or duty," the court said:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities the stream. The provision of the clause that the navi- constructed, not as an impost upon the navigation of gable streams should be highways without any tax, impost, or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels."—119 U. S. 548.

Speaking of tonnage duties, it was further said:

"A duty of tonnage within the meaning of the Constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition was designed to prevent the States from imposing hindrances of this kind to commerce carried on by vessels."—119 U. S. 549-550.

In **Packet Company v. St. Louis, supra,** the court reviewed the various duties imposed on the harbor-master of St. Louis, and said:

"The duties thus imposed upon the harbor-master, if faithfully discharged, must, it will be conceded, materially advance, and not obstruct or burden trade and business on the Mississippi River, especially at the port of St. Louis. Services rendered by him in the execution of those duties would be in aid, and not a hindrance, of commerce and navigation."—100 U. S. 427.

The authority and duty of the State to make proper harbor regulations suited to local conditions, and to actively supervise or operate the harbor in accordance with such regulations, in the absence of action by Congress, are now fully settled; that this must entail expense is obvious; that such service is not a hindrance to but in aid of shipping, is clear.

The question, then, resolves itself into the simple inquiry: Does the Constitution of the United States contemplate that such service shall be rendered at the expense of the taxpayers, or covered by some special fee not applicable to all ships which share the benefits of the service? We think not.

It is not questioned that the fees sued for were for the use of the harbor by appellant's ships in the conduct of the shipping business, that they had the benefit of the services outlined above, that the charges were reasonable for the service named in the order of the commission. Probably the insistence of appellant is that no charge can be made for such service.

In our opinion, the true test, under the decisions as we read them, is: Are the harbor fees a burden and hindrance to navigation and commerce, or are they a just return for the reasonable expense incurred in rendering a service facilitating navigation? Would

shipping be better off without such service and no charge or with such service and such charge?

Thus viewing the case, we hold the fees in suit are lawful charges for such service.

Affirmed.

Anderson, C. J., Gardner and Foster, JJ. concur.

Reported in 229 Ala. 624.